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IN THE

Supreme Court of the United States

October Term
No. 673

ROBERT J. BROCKER,
Petitioner,

v.

MARY ANN BROCKER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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IN THE

Supreme Court of the United States

October Term

No. .....

ROBERT J. BROCKER,

Petitioner,

vs

MARY ANN BROCKER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Doctor Robert J. Brocker, by his attorney, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania (Appendix P. 10), entered in the above case, on March 15, 1968.

On August 22, 1968, the Supreme Court extended the time to file the Petition for Writ of Certiorari to October 21, 1968.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1257 (3).

Questions Presented

1. Does a litigant have the right to proper notice of hearings, and the right to be present at such hearings involving either him personally, or represented by counsel, pursuant to the provisions of the Fourteenth Amendment of the United States Constitution.

2. Where the state court has not secured for Petitioner his right to proper notice of hearings involving him, has he not been deprived of property without due process of law in violation of the provisions of the Fourteenth Amendment of the Constitution?

3. Where a state court orders a conditional imposition of punishment for civil contempt against a litigant and such condition is that the litigant do something which is beyond his power to do, does not that Order deprive him of his property and his personal liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution?

4. Where Petitioner has obtained an Order of Court in the State in which he resides having competent jurisdiction over all the parties, granting him custody of his children, does he not have a right to rely on such court order? And if the courts of the Commonwealth of Pennsylvania do not see fit to recognize the orders of the Court of Ohio, is not such action contrary to Article Five of the Constitution of the United States, which states that "Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State."

Constitutional Provision Involved

The provision(s) of the United States Constitution involved herein are the (1) Fourteenth Amendment, the pertinent portion of which is as follows:

AMENDMENT XIV

> "Section I. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law . . ."

and; (2) Article Five, the pertinent portion of which is as follows:

AMENDMENT V

> "Section 1. Full Faith and Credit shall be given in each state to the public Acts, Records and Judicial Proceedings of every State."

Statement of the Case

The Petitioner, Doctor Robert J. Brocker, seeks a review of the judgment (Appendix P. 10), of the Supreme Court of Pennsylvania, the state court of last resort, whereby his Petition to vacate a contempt order was denied.

Robert J. Brocker, Petitioner, a neuro-surgeon, of Youngstown, Ohio, and Mary Ann Brocker, the Respondent, were divorced in 1962. By various orders, George P. Kiester, Judge of the Common Pleas Court of Butler County, Pennsylvania, awarded custody of their six children to Mary Ann Brocker from September through May, and to him during June, July and August of each year.

On August 10, 1966, the Petitioner presented to the Court of Common Pleas of Butler County a Petition for modification of the Custody Order, alleging the unfitness

of the Respondent and prayed that permanent custody of the children be awarded Petitioner. The Butler County Common Pleas Court, upon reading the averments of the Petition immediately removed the Respondent as custodian of the children and appointed Butler Attorney as Guardian *Ad Litem* for these children.

On August 22, 1966, the Petitioner began proceedings in the Courts of Ohio, the State of his residence and where the children were under the Butler County Order.

On September 12, 1968, an Order was signed by the Court in the State of Ohio, Mahoning County, Common Pleas Court Division of Domestic Relations, Juvenile Division, Case No. 19482, granting custody of said children to Petitioner and with visitation privileges to Respondent.

The Contempt Order, which is the subject of this prayer, arose as a result of the Petition presented August 10, 1966, to the Court of Common Pleas of Butler County. The course of these proceedings during the following month constitutes the injustice to Petitioner's rights. Petitioner authorized his Pittsburgh counsel, the only counsel which he had retained, to obtain an early hearing be before the children returned to school. Acting upon the authorization of the Petitioner, Pittsburgh counsel prepared the Petition delivered it to an attorney in Butler, who was engaged for the sole purpose of obtaining the early hearing, so that a hearing would be set before September 1, 1966. Butler counsel, however, got a hearing for October 11, 1966 and the Court removed the Respondent, and appointed a Guardian *Ad Litem* of the children.

On August 30, 1966, although an early hearing could not be granted on Petitioner's Petition, the Court did hold a hearing without notice, on a Petition to Modify a Support

Order filed by Respondent in April, 1966, returnable June 9, 1966, never argued or pressed by her until after the August 10, 1966 Petition was filed.

During the course of the August 30, 1966 hearing, counsel for the Respondent presented *ex parte* and without prior notice, a Petition for Contempt against Petitioner for failure to return the children. Two days later, September 1, 1966, and still without notice, the Court issued a Rule on Petitioner to show cause why he should not be held in Contempt, returnable the next day—the Friday before the Labor Day weekend.

Neither the Petitioner nor his counsel had notice of this hearing. The Butler attorney attempted to make appearance for the Petitioner, an appearance he was in no way authorized to make. The Court then rescheduled this Contempt hearing for September 6, 1966, the day after Labor Day, again without notice and thus without opportunity for the Petitioner or his counsel to be present. On the same day the Butler attorney was permitted to withdraw an appearance on behalf of the Petitioner, without giving notice of the withdrawal to the Petitioner or Pittsburgh counsel.

On September 6, 1966, without Petitioner or his counsel being present, the Butler County Court found Petitioner in contempt of court, assessed a penalty of $25,000.00, which penalty is for the use of the County of Butler, and purportedly remitting the same if Petitioner complied with the Orders of Court "within five days from this date". By the time said Order reached Petitioner from Butler, it was impossible for him to purge himself "within five days from" September 6, 1966. In practical effect this was an Order for Petitioner to do something which was beyond his power to do.

Reasons Relied on for the Allowance of the Writ

1. The Pennsylvania Supreme Court has erroneously decided Federal Questions of substance not in accord with Applicable decisions of this Court, raised on appeal in that Court by written and oral argument.

The Federal Questions of Substance are these:

I. (a) The Supreme Court of Pennsylvania affirmed the ruling of the Butler County Court of Common Pleas which issued the contempt order, because Petitioner failed "to comply with the Court's Amended Custody of June 18, 1965", *i.e.* to return children to Butler by September. Therefore the Pennsylvania Supreme Court said they need not consider the question of lack of notice being given at the hearing of September 6, 1966, in which the contempt order was issued. It is contended by the Petitioner that since he had obtained a custody order from Ohio, a state of competent jurisdiction, that he had a right to rely on the fact that a decree of a Court of a state cannot operate extraterritorially; that he had filed a petition for modification in the Ohio Court of original jurisdiction; and that he had a right to rely upon such order. Ford vs. Ford 3, 371 U. S. 187, 83 S. Ct. 272 [1962]. To issue a contempt order against him in light of the existing circumstances and without notice, was a flagrant deprivation of his right to be governed by due process of law, a right secured to your Petitioner by the Fourteenth Amendment to the United States Constitution.

(b) The Supreme Court of Pennsylvania ruled that the Butler County Court could "conditionally commit the Petitioner to prison for civil contempt" and held that the $25,000.00 fine was allowable. It is your Petitioner's contention that the Pennsylvania Supreme Court erred. Not only because the fine was imposed at a hearing of which

your Petitioner had absolutely no notice, but also because the condition which, if met, would purge Petitioner of his liability under the contempt order, was a condition which was impossible of compliance. The Pennsylvania Supreme Court did not rule on this question, and your Petitioner submits that only a ruling by this Court in favor of Petitioner will secure for Petitioner his rights under the Fourteenth Amendment. Roller v. Holly, 176 U. S. 398, 20 S. Ct. 410.

(c) The Supreme Court of Pennsylvania ruled that Article IV § 1, would seem to "require every Court in Ohio to give full faith and credit to the Pennsylvania Court's Custody Order and, in the absence of substantial and important changed circumstances, an Ohio Court should not be permitted to . . . modify the Pennsylvania Court's custody order." Your Petitioner maintains, as he did in the Pennsylvania Supreme Court, that there did exist, "substantial and important changed circumstances" at the time he received the custody order from Ohio, with which the Ohio Court agreed. In the light of these changed circumstances it was error for the Pennsylvania Supreme Court not to consider them in making its ruling, which is contrary to the Supreme Court in Halvey v. Halvey, 330 U. S. 610, 67 S. Ct. 903 [1947].

II. *This is a Cause of Public Importance.*

The judgment sought to be reviewed, if not reversed, could adversely affect the constitutional and legal rights of all. The vicious detriment to your Petitioner is incidental to that of the public. If the instant deprivations of property and individual liberties without due process of law could be inflicted upon one who has enjoyed the financial and social position of Dr. Robert J. Brocker, then they

could be visited upon anyone. Thus it is respectfully submitted that this Petition is not the sort of application for relief which this Honorable Court might view as a matter of personal only to Petitioner; but rather as a matter generally disaffecting the constitutional and legal rights of the public, and therefore, requiring a reversal by this Honorable Court.

Conclusion

The Writ should be granted.

Respectfully submitted,

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Washington, D. C. 20005,

Attorneys for Petitioner.

APPENDIX

Opinions Below

The Opinion of the Common Pleas Court of Butler County, Pennsylvania (Appendix P. 9) is not reported.

The Opinion of Supreme Court of Pennsylvania (Appendix P. 10) was entered March 15, 1968 (Appendix P. 10), and is reported in 429 Pa. 513.

IN THE COURT OF COMMON PLEAS

BUTLER COUNTY, PENNSYLVANIA

ROBERT J. BROCKER,
v.
MARY ANN BROCKER.

A. D. No. 77
September Term, 1962

Sep 2 4:05 P. M. 1966
Sep 7, 1966 Order of Court filed.

Order of Court

AND Now, September 6, 1966, the Court find Robert J. Brocker in contempt of this Court for wilful disobedience of the orders of this Court to return the children to Mary Ann Brocker at the end of the vacation period as provided in the custody order of June 18, 1965, modifying the custody order of October 15, 1964. The defendant is assessed a penalty of twenty-five thousand dollars, which penalty shall be for the use of the County of Butler, and an attachment for the defendant is issued to the sheriff of Butler County, and it is ordered that the defendant Robert J. Brocker, be committed to the Butler County Correctional Institution until there is full and complete compliance with the orders of the Court. The penalty is hereby remitted

if the defendant purges himself of his contempt by obedience to the orders of this Court within five days from this date.

The prothonotary is directed to notify Harvey E. Schauffler, Jr., Attorney at Law, 1408 Frick Building, Pittsburgh, Pennsylvania, 15219, by telephone and by registered mail of this order. The prothonotary is further directed to forward to Robert J. Brocker at his last address shown on the records in the probation office of Butler County notice of the entry of this order.

BY THE COURT,

GEORGE P. KIESTER,
Judge.

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

ROBERT J. BROCKER,
Appellant,
v.
MARY ANN BROCKER.

No. 39
March Term, 1967

Opinion by Mr. Chief Justice Bell, March 15, 1968

This is an appeal from a contempt Order issued by the Court of Common Pleas of Butler County, Pennsylvania. The Order held Dr. Brocker, the appellant, to be in contempt of Court for failure to comply with and obey its Custody Order of June 18, 1965, requiring Brocker to return his minor children to their mother at the end of a summer visitation period. This case has been rendered difficult because, *inter alia,* of the many diverse and offsetting motions by each of the parties, the sequence of

events, and the material differences between Brocker's two counsel.

The Facts

Dr. and Mrs. Brocker were divorced by the Court of Common Pleas of Butler County on *October 15, 1964.* At that time Mrs. Brocker was a resident of and was domiciled in Butler County, and Dr. Brocker was a resident of Ohio. The Order granting the divorce incorporated the written agreement of the parties for the custody and support of their six minor children. It pertinently provided: "Wife shall have the custody, care and charge of all the children of the parties herein in accordance with the existing Orders of the Common Pleas Court of Butler County, Pennsylvania, *or as they shall be changed or amended from time to time; and for this purpose the parties herein agree and submit themselves to the continuing jurisdiction of the Common Pleas Court of Butler County,* Pennsylvania, which Court shall have jurisdiction over all matters relating to the custody of said minor children, *regardless of the residence or domicile of the parties herein or their children, outside the geographic jurisdiction of said court.*"*

The aforesaid Order of the Butler County Court dated October 15, 1964 was amended by it on *June 18, 1965, sur* the Petition of Dr. Brocker (the father and husband), to provide that the Father (who is the present appellant) shall have custody of the six children during the summer vacation periods, commencing on the fifth day after the end of the spring school term and *ending five days prior to the beginning of the fall term.*

In accordance with this Amended Order, the children were delivered to the Father five days after the end of the

* Italics throughout, ours.

spring school term, to spend the summer at his residence in Ohio. At the end of the summer vacation period, the Father failed to return the children to their Mother (who continued to live in Butler County, Pennsylvania), as required by the aforesaid Amended Order of the Court.

On *August 10, 1966*, the Father presented to the Court of Common Pleas of Butler County a Petition for modification of that Court's aforesaid Amended Custody Order. His Petition alleged the unfitness of the Mother and prayed that permanent custody of the children be awarded to him. The Court thereupon issued a Rule upon the Mother to show cause why permanent custody of the children should not be given the Father, and a guardian *ad litem* was appointed by the Court to represent the rights, interests and welfare of the children. The Rule was returnable *October 11, 1966*, which would have been more than a month after the children should have been returned to their Mother, *i.e.*, five days prior to the beginning of the fall term of the new school year. The record then impliedly indicates that on August 25, 1966, Dr. Brocker instituted proceedings in the State of Ohio for the custody of the children; the record does not disclose whether the Mother appeared in said action either personally or through counsel, or what, if any, action was taken by the Ohio Court.

On *August 12, 1966* (*prior to* Dr. Brocker's above-mentioned custody suit in Ohio on August 25), the Mother filed a Petition with the Butler County Court (1) praying that her former husband be held in contempt for failure to pay support for their children as required by the Order of that Court, and (2) praying for an increase in the Court's original Support Order. A Rule to show cause was issued on Brocker and a hearing was held on August 30, 1966, at which Dr. Brocker's Butler County attorney

Gilchrist entered his appearance. During the course of this hearing, counsel for the Mother presented *another Petition* to that Court praying that *Brocker be held in contempt for his failure to return the children* to her *on August 25,* 1966 pursuant to the aforesaid Amended Custody Order of the Butler County Court, and that an attachment issue.

On *August 31,* after the conclusion of this hearing, the Butler County Court modified its Support Order by increasing the amount of support to $150 a month for each child. The next day, *September 1,* 1966, that Court issued a Rule on Dr. Brocker to show cause why he should not be held in contempt for failure to return their children to their Mother. This Rule was returnable on the afternoon of the following day, namely September 2nd. The Court obviously was concerned about having the children returned to the Mother in time for the new school year, and this occasioned the prompt scheduling of a hearing. While the record is not clear as to exactly what happened thereafter, the Court continued the hearing on the Rule until Tuesday, September 6, at 4:00 P. M. However, neither Brocker nor his counsel appeared at the hearing on *September 6.* The Court thereupon entered a Contempt Order which (1) assessed a penalty against Brocker in the amount of $25,000 payable to the County, and (2) provided for commitment of Brocker to prison pending compliance, and (3) further provided: *"The penalty is hereby remitted if the defendant purges himself* of his contempt by obedience to the orders of this Court within five days from this date [September 6, 1966]." *From this Contempt Order,* Brocker took this appeal.

Contempt

In order to properly evaluate appellant's contentions, it is necessary to briefly review the law with respect to contempt and its divisions, which are sometimes obscure.

The Courts have always possessed the inherent power to enforce their Orders and Decrees by imposing penalties and sanctions for failure to obey or comply therewith. *Commonwealth ex rel. Beghian v. Beghian,* 408 Pa. 408, 184 A. 2d 270; *Knaus v. Knaus,* 387 Pa. 370, 127 A. 2d 669; *Michaelson v. United States,* 266 U. S. 42; *Green v. United States,* 356 U. S. 165; *United States v. United Mine Workers of America,* 330 U. S. 258; *Commonwealth v. Perkins,* 124 Pa. 36, 16 Atl. 525; *Penn Anthracite Mining Co. v. Anthracite Miners of Pennsylvania,* 114 Pa. Superior Ct. 7, 174 Atl. 11; *Commonwealth v. Sheasley,* 102 Pa. Superior Ct. 384, 157 Atl. 27.

Contempt is divided legally into two classes: (1) Civil Contempt and (2) Criminal Contempt, (a) direct contempt and (b) indirect contempt. *Knaus v. Knaus,* 387 Pa., *supra; Philadelphia Marine Trade Assn. v. International Longshoremen's Assn.,* 392 Pa. 500, 140 A. 2d 814; *Commonwealth ex rel. Beghian v. Beghian,* 408 Pa., *supra; Marco Industries, Inc. v. United Steelworkers of America,* 401 Pa. 299, 164 A. 2d 205.

The dominant purpose and objective of the Court's Order is the *controlling* factor in the determination of whether the contempt was civil or criminal. Not only is the dividing line between civil and criminal contempt sometimes shadowy or obscure, but the same facts or conduct may constitute or amount to both civil and criminal contempt. *United States v. United Mine Workers of America,* 330 U. S., *supra.* Moreover, it is clear that a Court can for present or past acts of misbehaviour amounting to civil

contempt impose an unconditional compensatory fine and/or a conditional fine and imprisonment, and such fine may be payable to the United States or to the Commonwealth or to the county or to the individual who was injured. *United States v. United Mine Workers of America,* 330 U. S., *supra; McComb v. Jacksonville Paper Co.,* 336 U. S. 187; *Gompers v. Buck's Stove & Range Co.,* 221 U. S. 418; *Commonwealth ex rel. Beghian v. Beghian,* 408 Pa., *supra; Parker v. United States,* 126 F. 2d 370.

In *Parker v. United States,* the Court said (page 380): "It is well settled, however, that the court may, in a proceeding for civil contempt, impose the remedial punishment of a fine payable to an aggrieved litigant as compensation for the special damages he may have sustained by reason of the contumacious conduct of the offender. Gompers v. Buck's Stove & Range Co., 1911, 221 U. S. 418, 448, 449, 31 S. Ct. 492, 55 L. Ed. 797, 34 L. R. A., N. S., 874; Lamb v. Cramer, 1932, 285 U. S. 217, 220, 221, 52 S. Ct. 315, 76 L. Ed. 715; Merchants' Stock & Grain Co. v. Board of Trade, 8 Cir., 1912, 201 F. 20, 30; Delaware, L. & W. R. Co. v. Frank, 2 Cir. 1916, 230 F. 988; American Graphophone Co. v. Walcutt, C. C. S. D. N. Y. 1898, 86 F. 468; Krepick v. Couch Patents Co., 1 Cir. 1911, 190 F. 565, 569; Raymor Ballroom Co. v. Buck, 1 Cir. 1940, 110 F. 2d 207, 211; Aerovox Corp. v. Concourse Electric Co., 2 Cir. 1937, 90 F. 2d 615, 617; Lineker v. Dillon, D. C. N. D. Cal. 1921, 275 F. 460, 470, 476."

In *United States v. United Mine Workers of America,* 330 U. S., *supra,* the Supreme Court held that the trial Court properly found John L. Lewis guilty of indirect criminal contempt and the Union *guilty of both civil and criminal contempt.* The Court sustained a fine of $10,000 against Lewis for criminal contempt, but modified the fine

imposed by the lower Court upon the Union. The Supreme Court ordered the Union (a) to pay a fine of $700,000 and (b) to pay an additional fine of $2,800,000 unless the Union complied with the lower Court's temporary restraining Order and preliminary injunction within five days of the Supreme Court mandate. The Court said, *inter alia* (pages 298-299, 303-304): "Common sense would recognize that conduct can amount to both civil and criminal contempt. . . . The trial court also properly found the defendants guilty of civil contempt. *Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained.* Gompers v. Bucks Stove & Range Co., *supra,* at 448, 449. Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.

"But where the purpose is to make the defendant comply, the court's discretion is otherewise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.

"It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant."

The Contempt Order

Commonwealth ex rel. Beghian v. Beghian, 408 Pa. *supra*, is analogous to the facts in the instant case. In the *Beghian* case, temporary custody of two minor children during the summer months was awarded to their father, who lived in Italy. He refused to return the children at the end of the summer, whereupon the Court of Common Pleas of Allegheny County held the father in both criminal and civil contempt. On appeal, this Court held that the father's willful violation of the custody order constituted civil, but not criminal contempt. The Court said (pages 411-412): ". . . The problem most often presented in contempt cases is whether it is criminal or civil, and perhaps it is more difficult to distinguish between civil and indirect criminal contempt. It is therefore necessary to refer to the essential purpose of the proceeding. In Knaus v. Knaus, 387 Pa. 370, 376, 127 A. 2d 669, 672 (1956), it was said: *'The dominant purpose of a contempt proceeding determines whether it is civil or criminal.* If the dominant purpose is to vindicate the dignity and authority of the court *and to protect the interest of the general public*, it is a proceeding for criminal contempt. But where the act of contempt complained of is the refusal to do or refrain from doing some act ordered or prohibited primarily for the benefit of a private party, proceedings to enforce compliance with the decree of the court are civil in nature. The purpose of a civil contempt proceeding is remedial, and judicial sanctions are employed (1) to coerce the defendant into compliance with the court's order, and (2) in some instances to compensate the complainant for losses sustained: United States v. United Mine Workers of America, 330 U. S. 258, 303. A judgment in a civil contempt proceeding for the benefit of a private plaintiff will, of course, incidentally vindicate the authority of the court just as on the other

hand a criminal contempt judgment, which is punitive, may often advance private interests. But the test is the dominant purpose, not the incidental result: Gompers v. Bucks Stove & Range Company, 221 U. S. 418, 441.' "

In *Knaus v. Knaus,* 387 Pa., *supra,* the Court said (page 375): "A direct criminal contempt consists of misconduct of a person in the presence of the court, or so near thereto to interfere with its immediate business, and punishment for such contempts may be inflicted summarily: Act of June 16, 1836, P. L. 784, §§ 23, 24, 17 P. S. §§ 2041, 2042; Levine Contempt Case, 372 Pa. 612, 95 A. 2d 222; Snyder's Case, 301 Pa. 276, 152 A. 33. An indirect criminal contempt consists of the violation of an order or decree of a court which occurs outside the presence of the court: Penn Anthracite Mining Co. v. Anthracite Miners of Pennsylvania *et al.,* 151 Pa. Superior Ct. 234, 30 A. 2d 159. The procedural safeguards applicable to a commitment for an indirect criminal contempt are set forth in the Act of June 23, 1931, P. L. 925, § 1, 17 P. S. § 2047, which requires admission to bail, notice, a reasonable time to make a defense and affords trial by jury. Section 2 of that Act (17 P. S. § 2048) limits punishment to a maximum of a fine of $100, or imprisonment for fifteen (15) days, or both."

In this case it is clear that Brocker was guilty not of criminal contempt but only of *civil* contempt—Mrs. Brocker, the children's Mother, will benefit *primarily* from compliance with the Court's Order (even though the fine was payable to the County) and the dignity and authority of the Court will be *incidentally* vindicated.

Notice

Appellant Brocker contends he cannot be held in contempt of the Court's Amended Order of June 18, 1965,

because he had no notice, or no adequate notice, of the Court's contempt hearing on September 6, 1966. We need not decide whether he was entitled to notice of this hearing on September 6, 1966, and if so whether the Court's short notice of the hearing was adequate, because he was penalized and held in contempt of Court for *failure to comply with the Court's Amended Custody Order of June 18, 1965, of which Brocker was fully cognizant.* Appellant has never offered any legal justification for his failure to comply with this Amended Order, nor has he offered to now comply therewith.

Jurisdiction

While a Custody Order or Decree is always subject to modification or complete change by the proper Court, *acting in the best interest and for the best welfare of the children,* it cannot be ignored or violated by one of the parties at his (or her) whim, or changed by another Court unless that Court had both appropriate and constitutionally recognized jurisdiction. While it is a general rule that the domicile or residence—even temporary residence—of a child is sufficient to give jurisdiction to the Court of the County of such residence, the law on the subject of jurisdiction in child custody cases is conflicting and needs clarification and certainty.

In the instant case, both parents agreed that "the Common Pleas Court of Butler County should have *continuing jurisdiction* over all matters relating to the *custody* of their minor children, *regardless of the residence or domicile of the parties . . . or their children, outside the geographic jurisdiction of said court.*" The interpretation of this Agreement by the dissenting Judges distorts and nullifies this language. Moreover, under all the facts in this case,

especially when there is no proof of changed circumstances, Comity alone should prevent an Ohio Court from interfering with or changing the Amended Custody Order of the Butler County Court. Even more important, the Full-Faith-and-Credit clause of the Constitution of the United States—Article IV, § 1—would seem to require every Court in Ohio to give full faith and credit to the Pennsylvania Court's Custody Order and, in the absence of substantial and important changed circumstances, an Ohio Court should not be permitted to ignore or nullify or modify the Pennsylvania Court's Custody Order. Were the law otherwise, all a parent would have to do would be to move to another State (or from State to State) and keep or steal the children. The result (1) would be frequent litigation in different Courts in the different States, with conflicting Court Orders which would inevitably have a disturbing and detrimental effect upon the welfare of the children,* and (2) would greatly diminish the respect of the public for all Courts, and (3) most important of all, would make a mockery of, and in practical effect obliterate, the Full-Faith-and-Credit clause of the Constitution. This we will not permit!

Under the facts and circumstances of record, the Court of Common Pleas of Butler County did not err in holding Brocker in contempt of Court. Brocker obtained possession of the children solely under the visitation privileges granted him in the Amended Custody Order of the Butler County Court of *June 18, 1965.* Brocker knew that this Amended Custody Order obligated him to return these children to their mother in Butler County, Pennsylvania, in time for them to begin (five days prior to the beginning of) the fall term of their school. This he failed to do, nor

* Despite the protestations of a Court which is frequently unintentionally biased in favor of the home town parent, a child has too often become, in custody cases, a mere pawn in a game of chess or, worse yet, a shuttlecock in a game of badminton or of battledore and shuttlecock.

did he make any justifiable or legal explanation to the Butler County Court (or even to this Court in his present appeal) for his failure to comply with the Court's Order.

The Penalty

Finally, appellant argues that the $25,000 penalty constitutes an "inappropriate and illegal" punishment for civil contempt. Compare *Knaus v. Knaus,* 387 Pa., *supra; Com. ex rel. Beghian v. Beghian,* 408 Pa., *supra; Philadelphia Marine Trade Assn. v. International Longshoremen's Assn.,* 392 Pa., *supra.*

While a Court in a proceeding for civil contempt may impose the remedial punishment of a fine and make it *payable to an aggrieved litigant* as compensation for the losses or damages he may have sustained by reason of the contumacious conduct of the offender, and may also conditionally commit the defendant to prison for civil contempt, the penalty of $25,000 in this case was (as we have seen) *payable to the County,* and it was to be remitted if defendant purged himself of his contempt. See *Parker v. United States,* 126 F. 2d 370, 380, and numerous cases cited therein; *United States v. United Mine Workers of America,* 330 U. S., *supra; McComb v. Jacksonville Paper Co.,* 336 U. S. 187; *Gompers v. Buck's Stove & Range Co.,* 221 U. S. 418; *Williamson Case,* 26 Pa. 9.

Order affirmed; costs to be paid by appellant.

Concurring Opinion by Mr. Justice Roberts

Fundamental to the concept of due process is the notion that the law should never be permitted to direct its punitive force against a man unless that man is first given an opportunity to defend himself. To insure that this opportunity be not lost as a whisper in a windstorm, the law has created strict and often formal procedures whereby a potential defendant is notified of each proceeding at which his rights may be affected. Thus, when a Court undertakes, on petition of a private citizen, to hold a man in contempt, it is absolutely imperative that the defendant be notified of the pendency of this drastic action, and be apprised of the exact time and place at which a hearing will be held to determine whether punishment will be meted out. To hold, therefore, as the majority has done in the present case, that Dr. Brocker need not have been notified of the September 6, 1966 contempt hearing simply because he must have been aware that he was violating a June 18, 1965 custody order is to ignore both due process of law and reality itself.

As far back as 1912 this Court has held that a man may not be held in contempt of court "without such previous notice as will afford him an opportunity to be heard." *Douglass-Whisler Brick Co. v. Simpson,* 233 Pa. 517, 519, 82 Atl. 760 (1912). That rule remains unchanged. Nor will it suffice to say that the present defendant did not *need* any notice of the contempt hearing since he must have known that, by failing to return the children at the conclusion of summer vacation, he was violating a custody order issued over a year before. Indeed, this line of reasoning not only reduces itself to the proposition that a defendant need never be given notice of any contempt proceeding, but it also assumes that, in the present case at least, Dr.

Brocker must be held to have known that by failing to return the children he was not only violating the decree, but was also subjecting himself to a contempt citation by so doing. This second assumption, I believe, is completely unfounded. In fact, there is every reason to believe that Dr. Brocker felt assured that his actions were completely *within* the letter of the law.

It is uncontradicted that on August 10, 1966 Dr. Brocker petitioned the Court of Common Pleas of Butler County for an amendment of the June 18, 1965 custody order, alleging that he should be granted complete custody of the children on the grounds that Mrs. Brocker was an unfit mother; pursuant to that petition, a rule was issued upon Mrs. Brocker to show cause why the children should not be given to Dr. Brocker, said rule to be returnable October 11, 1966. Certainly, having secured the rule to show cause, Dr. Brocker need not have assumed that he would be in contempt of court by failing to return the children in August. Furthermore, when he realized that the Butler County Court was not going to act on his petition in time to decide the matter before the September school term began, Dr. Brocker then commenced an action in an Ohio Court on August 25, 1966. In fact, according to appellant's brief, not contradicted by appellee, he has now been awarded custody of the children by Ohio. Thus, when it is considered that appellant, at the time of the contempt hearing on September 6, had not one, but *two* court actions pending to obtain custody of the children, it seems a gross deprivation of due process to hold that he was not entitled to formal notice of the Butler County contempt proceeding simply because he should have known that his actions were a violation of the June decree.

Nevertheless, although I believe that Dr. Brocker was entitled to notice of the hearing, a careful examination of

the record convinces me that such notice was in fact given. Since Dr. Brocker's Pennsylvania counsel was from Pittsburgh, he decided to retain a Butler County lawyer to represent his interests in that forum. The record reveals that although Dr. Brocker himself did not appear, nevertheless his Butler counsel not only was present on August 30, 1966, the day the contempt petition was filed, but was also in Court on September 2, the return day for the contempt rule. On that day, counsel asked the Court to postpone the contempt hearing to September 6 and this request was granted. Later that same day, Butler counsel was permitted to withdraw from the case, but only after he had assured the judge that he *had* contacted Brocker's Pittsburgh attorney and told him of the hearing scheduled for September 6. On this appeal, appellant claims that his Pittsburgh counsel was never told this information. However, there is nothing in the record to support this contention except the bare fact that no one appeared on Brocker's behalf on the sixth. Absent something more than this, I would be loathe to conclude that the Butler attorney falsified information, in open Court, before a judge of his own county merely to withdraw from a case. I would therefore hold that Brocker's Pittsburgh counsel did have notice of the contempt proceeding; since notice of this sort to the lawyer should certainly bind the client, I conclude that Brocker's rights were not violated at this juncture of the litigation.

It is the majority's resolution of the merits of the contempt citation, however, that gives me greatest pause. Although I do not agree with appellant that the mere commencement of an Ohio custody proceeding relieves him of liability for contempt in Pennsylvania, nevertheless I am also unable to subscribe to the majority's notion that Ohio can do *nothing* to the June 18, 1965 custody order absent

"substantial and important changed circumstances." Not only does the majority fail to offer the slightest explanation of what constitutes a "substantial" and "important" changed circumstance, as opposed to the simple "changed conditions" which Pennsylvania cases require to alter a custody decree, see cases, *infra,* but the majority also interprets the thrust of Full Faith and Credit in this area in a manner seemingly contrary to the Supreme Court of the United States.

In *Halvey v. Halvey,* 330 U. S. 610, 67 S. Ct. 903 (1947), the mother had left her husband, taking their child to Florida while Mr. Halvey remained in New York. While in Florida she was granted a divorce and permanent custody of the child. However, on the day before the Florida custody order was officially rendered, Mr. Halvey traveled to Florida and spirited the child back to New York. Mrs. Halvey followed him North, and armed with her Florida custody decree brought *habeas corpus* in New York for return of the child. When New York, although returning the child, also *modified* the Florida custody decree to grant the father summer visitation rights, Mrs. Halvey appealed, arguing that under the Full Faith and Credit Clause, New York could not alter the Florida decree. After first pointing out that Florida itself could have modified its own custody decree, the Supreme Court held that New York did not have to give the Florida decree any *more* Full Faith and Credit than Florida would have given it. It therefore affirmed the state tribunal saying succinctly: "So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do." 330 U. S. at 614, 67 S. Ct. at 906. Thus, the conclusion is inescapable that in the present case, Dr. Brocker may justifiably rely on any custody award made by the Ohio Court so long as a similar award could have been

made by Pennsylvania, and so long as Ohio had proper jurisdiction.

It is no longer open to question that Pennsylvania custody decrees may be modified if conditions change which affect the child's welfare. *Commonwealth ex rel. O'Hey v. McCurdy,* 199 Pa. Superior Ct. 22, 24, 184 A. 2d 290, 291 (1962); *Commonwealth v. Bishop,* 185 Pa. Superior Ct. 362, 367, 137 A. 2d 822, 824 (1958). In *Bishop,* the Court insisted: "Orders determining the custody of children are temporary in their nature and are *always* subject to modification to meet changed conditions" (Emphasis supplied). Certainly it would seem that a finding if immoral behavior by the child's mother (as was here alleged) would be more than sufficient to meet our changed conditions test. Thus, under *Halvey,* Ohio could modify the June 18, 1965 Pennsylvania decree if that forum found that Mrs. Brocker's behavior had deteriorated to the extent claimed by her ex-husband.

So also am I convinced that on August 9, 1966, when Dr. Brocker began his Ohio action, that forum had jurisdiction to modify the 1965 custody decree. Under Ohio law, a court has jurisdiction to determine custody of a child so long as the child and one parent are present in that state when the action is commenced. *Reed v. Reed,* 11 Ohio Misc. 93, 40 Ohio Op. 2d 327, 229 N. E. 2d 113 (C. P. 1967); *Noble v. Noble,* 80 Ohio L. Abs. 581, 160 N. E. 2d 426 (C. P. 1959); *cf. Black v. Black,* 110 Ohio St. 392, 144 N. E. 268 (1924). Since it is undisputed that on August 25, 1966 the Brocker children were lawfully in Ohio with their father pursuant to the June 18, 1965 custody order, Ohio's jurisdiction cannot be questioned by Pennsylvania. In fact, it would seem that under *Halvey,* Ohio would have jurisdiction even if the children had been unlawfully taken into

that state, for in *Halvey* itself the children had been secretly taken from Florida to New York without the knowledge or consent of the mother who had just been awarded custody by a Florida Court. Yet it was nevertheless held that New York had jurisdiction to modify the Florida decree.

The majority lays great stress upon the agreement entered into between Dr. and Mrs. Brocker that Butler County would have continuing jurisdiction over matters concerning custody of the children regardless of their residence. From this the majority concludes that Ohio had no jurisdiction. However, the contract language nowhere recites that Butler County shall have *exclusive* jurisdiction. Rather I believe that a fair reading of this agreement shows that it was made simply to *permit* a Pennsylvania action where there might not otherwise be jurisdiction. It was not intended to prevent a second state from exercising concurrent jurisdiction.

Admittedly, the record in this case does not indicate the final outcome of Dr. Brocker's Ohio action, although it was acknowledged below that such action had been commenced on August 25, 1966. Only in appellant's brief is there any statement that this action has proceeded to judgment. It is there recited that Ohio has awarded custody of the children to Dr. Brocker. However, absent any indication in the record below of the resolution of the Ohio proceeding, I would at this time be unwilling to hold that Dr. Brocker is not in contempt of court for his failure to return the children to Pennsylvania. Rather, I believe that the proper resolution of this controversy requires that we leave the contempt citation undisturbed with the understanding that Dr. Brocker may purge himself of contempt by demonstrating to the Butler County Court that he has been awarded custody of the children by Ohio, or that he has returned the children to Pennsylvania.

Dissenting Opinion by Mr. Justice Jones

In *Commonwealth ex rel. Beemer v. Beemer,* 200 Pa. Superior Ct. 103, 188 A. 2d 475 (1962), the Superior Court held that, in a child custody case, where a party had *flagrantly* disobeyed an order of the trial court and was held in contempt, an appeal from such order should be quashed. Judge WATKINS, speaking for the Superior Court, said: "There are a rash of modern instances where court orders are disobeyed with impunity and respect for the law and the courts thereby weakened. It seems, therefore, that it is the duty of the appellate courts to see to it that every assistance is extended to the courts of this Commonwealth so that orders are meticulously carried out as otherwise the dignity of the judiciary, the majesty of the law and its enforcement are clearly undermined" (p. 106). We agree with the rationale of *Beemer* "that it is contrary to the principles of justice to permit one who has flaunted [*sic*] the orders of the courts to seek judicial assistance . . ." (p. 108).

In *Commonwealth ex rel. Goodwin v. Goodwin,* 413 Pa. 551, 198 A. 2d 503 (1964), we adopted the rationale of *Beemer.*

The record in the case at bar indicates a *flagrant* disobedience by Dr. Brocker of the orders of the Court of Common Pleas of Butler County. Even after this Court had granted supersedeas in connection with this appeal, Dr. Brocker wilfully disobeyed the condition upon which the supersedeas had been granted and persists in such disobedience to the orders of this Court. Under these circumstances, until Dr. Brocker stands ready and willing to obey the orders both of the Court below and this Court, he should be denied judicial assistance at the appellate level.

Dissenting Opinion by Mr. Justice Cohen

In *Commonwealth ex rel. v. Daven,* 298 Pa. 416, 148 Atl. 524 (1930), we held that whenever a court is called upon to award custody of a child the fact that another jurisdiction has made an award is of no import. In *Daven,* the mother surreptitiously moved her children from North Carolina in violation of an order of a North Carolina Court and we held that the order of the North Carolina Court is important here only insofar as it may have a bearing upon the mother's fitness to be awarded custody of the children.

If here the Ohio Court has exercised jurisdiction over the children by making an award of their custody to the father, our Courts should have no feeling of frustration since we indulge in the same "ouster" of sister-state orders in custody matters. Since the record does not clearly indicate that the Ohio Court has made an order awarding custody of the children to the father, I would vacate the contempt adjudication and penalty imposed by the Court below and demand the case for the purpose of determining the existence of such order.

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In the Supreme Court of the United States

October Term, 1968

No. 673

ROBERT J. BROCKER,

Petitioner

v.

MARY ANN BROCKER,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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IN THE SUPREME COURT
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

JURISDICTION

The Petitioner has alleged that this Court has jurisdiction to review the decision of the Supreme Court of Pennsylvania in this matter upon Certiorari under 28 U.S.C.A., Section 1257(3). To come within the scope of that section, Petitioner has alleged breach of his rights under the Fourteenth Amendment to the United States Constitution relative to due process of law and that the Pennsylvania court violated the Fifth Amendment relative to full faith and credit in not recognizing judicial proceedings of a sister state.

Respondent respectfully denies Petitioner's allegations and specifically avers that the Supreme Court of Pennsylvania did not violate either the Fourteenth Amendment or the Fifth Amendment of the United States Constitution in disposing of Petitioner's appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. In a civil contempt proceeding is procedural due process of law satisfied where service of a petition alleging contempt of court and a rule to show cause why the defendant should not be held in contempt is made upon an attorney of record who has appeared for defendant, filed papers in the case and who has taken an active part in other proceedings between the same parties, where the defendant at the time of service is outside the geographic boundaries of the court whose order is defied?

2. Is an order of court made after notice and opportunity to be heard a violation of the Fourteenth Amendment to the United States Constitution when it declares defendant to be in contempt of court and imposes a conditional penalty, unless defendant purges himself of the contempt within five days of the date of the order, and where defendant takes no action to purge himself of the contempt or to have the order modified; but merely alleges, dehors the record, on appeal, that the condition was impossible for him to fulfill?

3. Is an ex parte interlocutory order of the lower courts of Ohio, which is not a matter of record in a case before the Supreme Court of Pennsylvania, and which is raised in the first instance at that level of the proceedings, entitled to full faith and credit by the Pennsylvania Court under the Fifth Amendment to the United States Constitution?

COUNTER-STATEMENT OF THE CASE

This case involves an action in divorce begun in 1962 and related matters of custody and support of minor children. By various pleadings, petitions, written agreements and actions taken in regard thereto, Petitioner submitted himself to the jurisdiction of the Common Pleas Court of Butler County in regard to custody of his children. That court, by order dated October 15, 1964, as amended by order dated June 18, 1965, ordered custody of the parties' six minor children in respondent from September until June, and a portion of the summer school vacation was awarded to petitioner. In June 1966, in compliance with the orders of court, respondent delivered, and petitioner received, summer custody of the children. On August 9, 1966, while the children were still with the petitioner under the custody orders, petitioner, through counsel, presented a petition to the Court of Common Pleas of Butler County, requesting that the previous custody orders again be amended; upon this petition the court issued a rule returnable to October 11, 1966. Thereafter, in August, 1966, petitioner notified respondent and the lower court that he refused to return the children to respondent from his residence in Ohio.

At the same time a contempt proceeding concerning support payments which had been begun April 11, 1966, but which was continued until August 30, 1966, by request of petitioner was pending in the Butler County Court. Petitioner did not appear personally for the Au-

gust 30, 1966 hearing. However, he was represented by two attorneys of record. One of petitioner's attorneys appeared at the August 30, 1966 hearing and actively participated. At the end of this particular hearing, respondent presented a petition alleging contempt of court for the wilful disobedience of the order of June 18, 1965, and requested that a rule issue on petitioner to show cause why he should not therefore be held in contempt of court. The papers and rule were served upon counsel of record. A hearing was set for September 2, 1966, as the school term for the year 1966 was about to commence. Petitioner did not appear for the September 2, 1966 hearing. However, one of petitioner's attorneys of record did appear. The court continued the hearing until September 6, 1966, to grant additional time in which petitioner could appear. Counsel for petitioners was directed to notify forwarding counsel in Pittsburgh of the new time and date. Subsequently, after the hearing held on September 2, 1966, local counsel for petitioner advised the court that his client and co-counsel would not cooperate with him and would not appear, and he therefore asked leave to withdraw as counsel. This permission being granted only after local counsel assured the court that he had given notice of the September 6, 1966 hearing as directed by the court.

On September 6, 1966, at the time and place set, petitioner did not appear, nor was he represented by counsel. Therefore, the court declared him to be in wilful contempt of the court's order of June 18, 1965, and imposed certain conditional penalties to enforce compliance. The penalties were in the form of a $25,000.00 fine for the use of Butler County and an attachment for petitioner's

arrest. Both penalties were made contingent upon petitioner purging himself of the contempt within five days. Petitioner never attempted to purge himself of the contempt or to have the lower court modify its contempt order, based upon defective or inadequate notice or for any other reason.

Subsequently, when petitioner's appeal was before the Supreme Court of Pennsylvania he petitioned that court for a supersedeas. His request was granted provided he return the children as required by the June 18, 1965 court order. Petitioner refused to comply with the Supreme Court's condition and the supersedeas was vacated by the court. The contempt citation was affirmed and petitioner seeks review by this Court.

ARGUMENT IN OPPOSITION TO THE ALLOWANCE OF THE WRIT OF CERTIORARI

I.

In *Blackmer vs. United States,* 284 U.S. 421, 52 S. Ct. 252 (1932) it was held that,

> ". . . in proceedings to punish for contempt, the requirement of due process is satisfied by suitable notice and adequate opportunity to appear and to be heard."

This general rule must be applied to the facts of each case. In this case the facts clearly show that petitioner was given suitable notice and an adequate opportunity to appear and be heard. The record discloses the following facts.

Throughout the entire course of the divorce proceedings and related custody matters, the petitioner was represented by various attorneys, petitioner's two attorneys, at the time that the contempt order was made were from Pittsburgh and Butler County, Pennsylvania. The record shows that both the Pittsburgh attorney and the Butler attorney entered appearances in the Butler County Courts as counsel for the petitioner.

Prior to the entry in the case by these two attorneys, the court had scheduled a hearing for June 9, 1966, notice of said hearing having been served upon petitioner's then counsel of record. However, on June 8, 1966, a motion for continuance was made jointly by the Pittsburgh

and Butler attorneys for petitioner. The continuance was granted. The hearing was rescheduled for August 30, 1966. A subsequent motion to continue was submitted but denied on August 26, 1966. On August 30, 1966, the Butler attorney appeared at the hearing and actively participated on petitioner's behalf. Petitioner did not appear personally. At the end of the hearing on August 30, 1966, respondent presented petitions to the lower court requesting that a rule be issued upon petitioner to show cause why he should not be held in contempt for his wilful disobedience of the order of June 18, 1965.

The Court then ordered that the rule be made returnable on September 2, 1966, at 2:30 o'clock p.m. and that service be made upon the Butler attorney as local counsel for petitioner, which was accomplished. The Butler attorney appeared at the time set and reported that he had contacted the Pittsburgh attorney on September 2, 1966, but not petitioner personally. Therefore, at the request of counsel for petitioner, the court, in the presence of counsel for petitioner and in open court, rescheduled the matter for September 6, 1966 at 4:00 o'clock p.m. Subsequently, on September 2, 1966, the Butler attorney was granted permission to withdraw from the case by order of court made at 4:05 o'clock p.m. after notifying the Pittsburgh attorney, the other counsel for petitioner, of the hearing set for September 6th. On September 6, 1966, no attorney representing petitioner appeared, nor did petitioner appear personally for the contempt hearing.

Petitioner has argued that Butler counsel never gave notice to Pittsburgh counsel, or to petitioner, about the

pending September 6, 1966 contempt hearing. There is nothing in the record that supports this claim. The record indicates that the Butler attorney acting for petitioner acknowledged receipt of copies of the petitions for contempt and of the rule to show cause on September 1, 1966. The hearing was continued from September 2, 1966, until September 6, 1966, at the request of petitioner's Butler counsel. Before the Butler counsel was permitted to withdraw from the case, he assured the court he had notified Pittsburgh counsel of the September 6, 1966 hearing. Counsel now denies notice and claims petitioner was not granted due process of law as he was not present or represented when the contempt order was made. Petitioner's argument is not supported by facts of record. It is provided in the Pennsylvania Rules of Civil Procedure that service of petitions, rules, orders and notices may be made upon the attorney of record. Pa. R.C.P. 233; 1027(2).

Furthermore, in regard to the specific question of contempt proceedings, the general rule is that:

> "Where a party has been served with process and has appeared by attorney, and a decree or order has become binding on him, service of an order to show cause why he should not be punished for contempt thereof (or an order for an attachment) may be made on his attorney if the need to do so appears, as in the cases of absence from . . . within the jurisdiction . . ."

Annot., 60 *A.L.R.* 2d 1244 (1958);

Robb vs. Pepper, 11 N.N.C. 497 (1882) (Pa.).

Argument

In the case at bar, petitioner was represented by two counsel of record. Copies of the petition for contempt and orders of court pertinent thereto were served upon said counsel by direction of the court. To allow petitioner to escape punishment for wilful contempt of court due solely to an unsupported claim of lack of notice in light of the above would make enforcement of all orders in similar cases impossible. The guilty party would simply not appear for the hearing and have his counsel withdraw from the case.

II.

Petitioner has argued that the Pennsylvania Supreme Court denied him due process of law in upholding the conditional punishment for contempt, petitioner's argument being that it was impossible for him to comply with the condition. We disagree with this argument. The order for contempt imposed a $25,000.00 fine and directed an attachment for petitioner's person unless petitioner complied with the June 18, 1965 custody order within five days, of September 6, 1966. This time limitation was held to be reasonable in *United States vs. United Mine Workers of America,* 330 U.S. 258, 67 S. Ct. 677 (1947).

The record shows that the contempt order was served by certified mail on petitioner and counsel for petitioner, on September 7, 1966. The petitioner had only to return the children to respondent, required by the custody order, and he would have complied and would have thereby purged himself of contempt. We have already seen that the limitation of five days in which to perform was reasonable, and even that limitation was not incapable of modification if the petitioner had indicated a desire to purge himself of the contempt after the five day period, which he never did. Therefore, petitioner could have performed and purged himself of contempt so the condition was not impossible to accomplish and therefore not a denial of due process of law.

III.

Petitioner has also argued that Pennsylvania denied full faith and credit to a judicial proceeding in Ohio regarding the custody of the children. Petitioner alleged that the circumstances had changed from those in effect when the June 18, 1965 custody order was entered. And that he had commenced an action for custody in Ohio. However, when this case was before the Supreme Court of Pennsylvania no such proceeding or judgment rendered therefrom was part of the record before the Pennsylvania Courts. The petition filed in this court for a Writ of Certiorari disclosed that custody was granted to petitioner by Ohio on September 12, 1968. However, the Supreme Court of Pennsylvania disposed of this case by opinion and order dated March 15, 1968.

Furthermore, any order for custody that is obtained ex parte and without proper jurisdiction over the person of the party to be bound thereby is not entitled to full faith and credit in the courts of a sister state. *May vs. Anderson,* 345 U.S. 840, 73 S. Ct. 840 (1953).

Respondent never had been served by process for any custody proceeding in Ohio, nor had she appeared as a party to any such proceeding when the petitioner claimed an award of custody from Ohio at the time this case was before the Supreme Court of Pennsylvania. The only notice of any Ohio proceeding was that given by petitioner when he informed the respondent and the lower court that he would not return the children to respondent for the 1966 school term. To this day no exemplification or

evidence of any proceeding in the State of Ohio has been made a matter of record before the Common Pleas Court of Butler County. Likewise, none of the allegations in the brief and petition for certiorari regarding lack of notice, etc. have ever been introduced into evidence before the Butler County Courts upon any petition to rescind, modify or amend the contempt order. Upon the basis of the record as it stands the Pennsylvania Supreme Court decision did not violate any constitutional guarantee. Thus, the Pennsylvania courts did not violate Article IV, Section I of the United States Constitution in this case.

CONCLUSION

This case is one of purely personal interest to the petitioner and respondent and has no general public importance. The questions of whether or not petitioner was in contempt of court and therefore could be punished are the crux of the matters raised. This Honorable Court should deny the request for a Writ of Certiorari for the foregoing reasons.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 673

ROBERT J. BROCKER, *Petitioner,*

v.

MARY ANN BROCKER, *Respondent.*

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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In the Counter Statement of the Questions Presented (#1), Respondent assumes as fact that which is not fact. As appears in the Petition, the attorney upon whom the service of the petition alleging contempt was made, was not an authorized representative of the Petitioner's legal rights, and therefore had no power to affect those legal rights.

Again, in (#2), Respondent is assuming that notice and opportunity to be heard in fact existed, and this is a false assumption; to state the question as Respondent does, is to misstate the issue.

In the counter statement of the case Respondent maintains that "One of petitioner's attorneys appeared at the August 30, 1966 hearing and actively participated" and concerning the hearing of September 2,

1966 ". . . One of petitioner's attorneys of record did appear". The above statements incorrectly assume that petitioner had retained two attorneys. The Butler attorney was employed in a very narrow scope, for a specific and limited purpose, and had no authorization to make the appearance on behalf of the Petitioner, to which Respondent refers.

Respondent further states that the Butler attorney, ". . . asked leave to withdraw . . .", and at such time he "assured the court that he *had given* (Petitioner) notice of the September 6, 1966 hearing . . ." The record reveals, however, that the Butler attorney was allowed to withdraw, at the close of the hearing of September 2, 1966. At that hearing the date of September 6, 1966 was set for the new hearing. Thus, Respondent would have this Court believe that, although the Butler attorney only learned of the new date at the close of the September 2, 1966 hearing he also, before withdrawing, notified Petitioner's counsel of the new date. But it also appears that in Respondent's Petition for Extension of Time to File Answer, it is stated that, at the close of the September 2, 1966 proceedings the Butler attorney assured that Court that he *would* give notice to Petitioner's counsel of the new hearing date. Respondent now maintains that leave to withdraw was granted the Butler attorney only after he had assured that court that he *had given* notice to the Pittsburgh counsel. (Italics Supplied).

Argument No. I

It is the position of the Petitioner herein that the Butler attorney was not acting on his behalf at the numerous hearings held in the Butler County Court during the Summer of 1966. The Petitioner retained

one (1) attorney, (Pittsburgh Counsel) and only one was authorized to represent Petitioner. The Butler attorney was employed in order to ask the Butler County Court for an early hearing date on the issue of the custody of the children. As his scope of employment was so limited so was his power and authority. Once that Court decided that an early hearing date could not be scheduled, the Butler Attorney had fullfilled his limited function and any further attempt on his part to represent the rights of the Petitioner is wholly nugatory. This applies mainly to the contentions of Respondent that "service . . . may be made on his attorney". This is a correct statement of the law where the appearance of the attorney was authorized. In the hearings before the Butler County Court, however, the attorney who was served, was not authorized, and therefore service upon him cannot constitute service upon your petitioner.

Argument No. II

Respondent suggest that petitioner could have asked the Butler County Court for a modification of the Contempt Order, if petitioner found that he could not comply with the Order within the prescribed five (5) day period. This is not an issue before this Honorable Court. What may have or could have been done is not a pertinent point of inquiry. Petitioner was fined $25,000.00 because he did not comply with an Order of the Butler County Court, when it was, in fact, impossible for him to comply. Respondent fails to point out that the Order of the Butler County Court was not received through the mails until the five (5) days in which petitioner could have perged himself had expired. The record only shows that the Order was only

mailed, on September 7, 1966, and no record exists as to when it was received until after the five (5) days had elapsed.

Argument No. III

Respondent states that custody of the children was granted to the Petitioner by the Ohio Court on September 12, 1968. That date is incorrect, and if your Petitioner has previously suggested that the Order was granted on the above date, he now says that it is in error. The Order was filed by the Court of Common Pleas, Division of Domestic Relations, Juvenile Division of Mahoning County, on September 12, 1966. Therefore, on March 15, 1968, the date on which the Supreme Court of Pennsylvania filed its opinion in this case, the Ohio custody Order was in full effect.

CONCLUSION

This case is one of public importance and interest, in that it involves the denial of rights to a citizen which the constitution protects and guarantees to all citizens. This Honorable Court should allow the request for a Writ of Certiorari for the foregoing reasons.

Respectfully submitted,

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